

No. 13056

United States
Court of Appeals
for the Ninth Circuit.

A. PAUL OLINGER AND RUTH HUFFMAN,

Appellants,

vs.

FRANK H. PARTRIDGE, Brigadier General,
United States of America, Commanding Gen-
eral, Camp Roberts, California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court, Southern
District of California, Central Division

No. 12917—HW

In the Matter of the Application of

A. PAUL OLINGER,

for a Writ of Habeas Corpus.

PETITION OF WRIT OF HABEAS CORPUS

To the United States District Court, Southern District of California, Central Division:

The petition of Ruth Huffman respectfully shows:

A. Paul Olinger, also known as Alphonse Paul Olinger, has been inducted into the military service of the United States of America, and is thereby detained, confined and restrained of his liberty by the Commanding General/Officer of Camp Roberts, a United States Army/Military Camp, Doe I, Doe II and Doe III, in the County of San Luis Obispo, State of California.

Your petitioner is the fiancée of the said A. Paul Olinger and is personally authorized by him to make this application in his behalf.

The said induction into the military service of the United States of America, detention, confinement and restraint are illegal; and the illegality thereof consists in this, to wit: [2]

Petitioner is informed and believes and on such information and belief alleges as follows:

1. A. Paul Olinger was before and at the time of

his draft and induction into the military service of the United States an officer in the United States Merchant Marine, and a licensed first assistant engineer of steam vessels under Chapter 11, Title 46, United States Code, and the first assistant engineer on the S.S. Willamette Victory, a steam vessel. Section 225, Chapter 11, of Title 46, United States Code, provides, among other things, that "No * * * engineer of steam vessels, licensed under this chapter shall be liable to draft in time of war except for the performance of duties such as required by his license." Notwithstanding the provisions of this section exempting him from draft and induction except for the performance of duties such as required by his license, A. Paul Olinger was drafted and inducted into the military service on or about February 6, 1951, not for the performance of duties such as required by his license.

2. First assistant engineer ship officers were and now are included in the list of critical occupations eligible for draft deferment. A. Paul Olinger was before and at the time of his draft and induction a licensed first assistant engineer ship officer on the S.S. Willamette Victory, and eligible for draft deferment; but, notwithstanding, he was drafted and inducted into the military service on or about February 6, 1951.

3. Local Draft Board No. 126, Long Beach, California, hereinafter referred to as draft board, acting under authority of the Selective Service Act and Regulations of the United States, and as a branch of the Executive Department of the United States,

classified A. Paul Olinger [3] as 1-A. Under the Selective Service Act and Regulations, A. Paul Olinger had the right to appear and discuss his 1-A classification with said draft board, to present new information, and to discuss his classification on the basis of information already on file and to make oral argument that the information already furnished when given proper weight, calls for a different classification. On or about August 5, 1950, after receiving notice from said draft board to report for physical examination, A. Paul Olinger personally appeared at said draft board for a personal interview to discuss his classification with which he was dissatisfied and to obtain a reclassification. At said time and place, said draft board refused to give him an interview, refused to hear him or his case, or to consider any new information which he offered to present to said draft board. In the later part of August, 1950, A. Paul Olinger received from said draft board a notice to report for his induction on September 18, 1950, on which date he was at sea and unable to report. Thereafter, while he was at sea, his attorney, Nicolas Ferrara, communicated with said draft board and discussed his case with Patricia Fish and requested, in substance, that A. Paul Olinger be given an opportunity to present his case to said draft board to which she replied that merchant seamen were not exempt and there was no necessity to have any hearings. On or about August 13, 1950, A. Paul Olinger requested of said draft board the opportunity of presenting his case personally to said draft board. Thereafter, on February

3, 1951, A. Paul Olinger personally appeared at said draft board to discuss his classification, at which time said draft board handed him a notice for him to report for induction on February 5, 1951, refused to hear him or his case and refused to consider any new information which he offered to [4] present at the time. Additionally, for the greatest part of his time, A. Paul Olinger was at sea and in the Orient aboard the S.S. Willamette Victory as first assistant engineer ship officer, and although he requested of said draft board a deferment classification and opportunity to make an appeal before said draft board, he received no answer to his requests from said draft board, nor did he receive from said draft board any notice of his right to appeal from his classification if he was dissatisfied; nor did he have the opportunity to appear before said draft board for a personal interview and discussion of his classification at an earlier date or to appeal from said draft board's classification by reason of his continued absence at sea. Before the filing of this petition, and before the draft and induction of A. Paul Olinger, the said Nicolas Ferrara, attorney for A. Paul Olinger, communicated with said draft board's appeal agent, a Mr. Kenneth A. Davis, Farmers & Merchants Building, Long Beach, California, and after a lengthy discussion requesting a hearing on A. Paul Olinger's classification, the said Mr. Davis refused to intervene and refused to hear his case for a deferred classification. Said draft board and each of the members thereof thereby acted and proceeded arbitrarily without due regard to A. Paul Olinger's

rights to which he was entitled under the Selective Service Act and Regulations and he was denied a fair hearing and due process; additionally, said draft board and each of the members thereof acted without jurisdiction in issuing an induction order drafting and ordering him to report for induction on February 5, 1951; and said draft board and each of the members thereof further acted without jurisdiction in drafting and inducting A. Paul Olinger into the military service of the United States on February 6, 1951. At no time did said draft board reclassify A. Paul Olinger after his request for a [5] deferment classification or after he personally appeared before said draft board for an interview to discuss his classification after requesting same; in any event, if A. Paul Olinger was reclassified, said draft board did not notify him of his reclassification.

A. Paul Olinger was inducted into the military service on February 6, 1951, at Los Angeles County, California, at about 8:00 a.m.; and he has been in the military service continuously since said time, and he has not been taken before any court or magistrate, and there is no law or provision for his release on bail.

Said A. Paul Olinger is not held by virtue of any complaint, indictment, presentment, warrant, or quarantine law, rule, regulation, arrest or order, except as above specifically set out. No other application for a writ of habeas corpus has been made by or in behalf of said A. Paul Olinger in regard to said restraint.

Wherefore, your petitioner prays that a writ of

habeas corpus may be granted, directed to the said Commanding General/Officer, Doe I, Doe II and Doe III, commanding him or them to have the said A. Paul Olinger before said court, at a time and place therein to be specified, to do and receive what shall then and there be considered by said court, concerning the person so restrained together with the time and cause of his detention, and said writ; and that he may be restored to his liberty.

Dated: March 1, 1951.

/s/ RUTH HUFFMAN,
Petitioner.

/s/ NICOLAS FERRARA,
Attorney for Petitioner and Applicant. [6]

State of California,
County of Los Angeles—ss.

Ruth Huffman being duly sworn, says that she is the petitioner named in the foregoing petition; that she has read the said petition and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief, and as to those matters she believes it to be true.

/s/ RUTH HUFFMAN

Subscribed and sworn to before me this March 1, 1951.

[Seal] /s/ NICOLAS FERRARA,
Notary Public in and for said County of Los Angeles, State of California.

[Endorsed]: Filed March 5, 1951.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE WHY WRIT OF
HABEAS CORPUS SHOULD NOT ISSUE

A petition for writ of habeas corpus having been
filed herein;

It Is Ordered, that the Commanding General/
Officer of Camp Roberts, a United States Army/
Military Camp, Doe I, Doe II and Doe III, in the
County of San Luis Obispo, State of California,
show cause in the United States District Court for
the Southern District of California, Central Division,
in the Federal Building, Los Angeles, California,
in the courtroom of Honorable Harry C. Westover,
one of the Judges of said Court, on Monday, the
9th day of April, 1951, at 10:00 a.m., why the writ
should not issue and the relief prayed for should
not be granted.

Dated: March 29, 1951.

/s/ HARRY C. WESTOVER,
Judge.

[7]

[Endorsed]: Filed March 29, 1951.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE WHY
WRIT OF HABEAS CORPUS SHOULD
NOT ISSUE

I, Frank H. Partridge, Brigadier General, USA, Commanding General, Camp Roberts, California, respondent herein, make the following return to the Order to Show Cause why Writ of Habeas Corpus should not issue in the above entitled action, in the manner set forth below.

I.

That A. Paul Olinger, listed in the records of the United States Army as Private Alphonse P. Olinger, US 56078595, having been found physically and mentally fit for training and service, was inducted into the Army of the United States on or about February 6, 1951 and is undergoing basic training at Camp Roberts, California.

II.

That the said A. Paul Olinger, hereinafter referred to as applicant, is not being illegally restrained, detained, and/or confined by your affiant but is in the custody of your affiant under proper and lawful authority as a private in the United States Army undergoing basic training.

III.

That authority to so train the applicant is found in paragraph (a) [8] of Section 454, Title 50 U.S. C.A., which states, "The President is authorized

from time to time, whether or not a State of War exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this Title such number of persons as may be required to provide and maintain the personnel strengths of the respective Armed Forces authorized by Section 2 of this Title, (Sec. 452, 50 U.S.C.A.).

IV.

That basic training is provided for all inductees and/or recruits who have not heretofore had military training of any kind in the Armed Forces of the United States.

V.

That applicant has had no previous military training and is therefore subject to the basic training required of all persons similarly situated.

VI.

That the present period of basic training prescribed is 14 weeks.

VII.

That applicant commenced his basic training February 26, 1951 and will not complete said training until June 2, 1951.

VIII.

That aside from the duties assigned in accordance with said basic training, appellant has not yet been assigned to any branch of the Army which considers the background and experience of the petitioner nor will he be so assigned until his basic training has been completed.

IX.

That said basic training is necessary to acquaint applicant with military dress, conduct and procedures which are fundamental and basic to orderly service in the Army of the United States before assignment to duties for which he may be qualified.

X.

That answering paragraph numbered (1) of the Petition for Writ of Habeas Corpus, respondent alleges that Section 225, Chapter 11, of Title 46, U.S.C., [9] which provides, among other things, that “No * * * engineer of steam vessels, licensed under this chapter shall be liable to draft in time of war except for the performance of duties such as required by his license,” (enacted May 28, 1896), upon which applicant relies, has been superseded by Section 17 of the Selective Service Act of 1948 (50 U.S.C., War Appendix, Sec. 467) which provides, “Except as provided in this Title, all laws and parts of laws in conflict with the provisions of this Title are hereby suspended to the extent of such conflict for the period for which this Title shall be in force.”

XI.

Answering paragraph numbered (2) of the Petition for Writ of Habeas Corpus, respondent alleges that with regard to the second sentence thereof he has no knowledge or information sufficient to form a belief as to the truth of the averments set forth therein and basing his denial upon such grounds denies each and every allegation contained therein, except that respondent admits that the applicant

was drafted and inducted into the military service on or about February 6, 1951.

Answering the first sentence of said paragraph, respondent denies the allegations thereof and alleges that the Selective Service Act of 1948 provides no authority for deferment or exemptions because of former or present service as merchant seaman; that Section 454 of Title 50, U.S.C.A., in subsection (a), provides, "Except as otherwise provided in this Title, every male citizen of the United States, * * * who is between the ages of 19 and 26, * * * shall be liable for training and service in the Armed Forces of the United States."

XII.

Answering paragraph numbered (3) of said Petition, respondent admits that Local Draft Board No. 126, Long Beach, California, acting under the authority of the Selective Service Act and Regulations of the United States, classified A. Paul Olinger as 1-A on October 8, 1948, and with regard thereto respondent further alleges that Selective Service System Form 110, notifying applicant of said classification was mailed to him on October 11, 1948. That said Form states, among other things, upon the face thereof the following: [10]

"Notice of Right to Appeal

Appeal from classification by Local Board must be made within 10 days after the mailing of this notice by filing a written notice of appeal with the Local Board.

Within the same 10 day period you may file

a written request for personal appearance before the Local Board. If this is done, the time in which you may appeal is extended 10 days from the date of mailing of the new Notice of Classification after such personal appearance.”

That applicant during the years 1948 and 1949 made no effort to appear and discuss his classification with said Draft Board to present new information or to discuss his classification on the basis of information already on file.

That respondent alleges that he has no knowledge or information sufficient to form a belief as to the truth of the averments set forth in all other respects in paragraph numbered (3) of said Petition and basing his denial upon such grounds denies the allegations therein contained, not hereinabove admitted.

Your respondent alleges however that your respondent, in accordance with Section 2f of AR 615-365, dated July 19, 1949, which section covers requests for a discharge based upon an individual's claim that prior to induction he was denied a procedural right as provided by the Selective Service Act of 1948, and was therefore erroneously inducted, made inquiry with regard to the legality of the induction of the applicant to the State Director of Selective Service System of the State of California, Colonel K. H. Leitch. Respondent was informed by the said Colonel K. H. Leitch, and upon such information and belief alleges that the applicant was not erroneously inducted, and the induction of said applicant was entirely legal and proper, as will more fully appear from the affidavits of Major E. N.

Keeley, AGC, District Coordinator for the Selective Service System of the State of California, which are attached hereto and made a part hereof. [11]

Wherefore, respondent prays that the Petition for Writ of Habeas Corpus be denied and that no Writ be issued.

/s/ FRANK H. PARTRIDGE,
Brigadier General, USA, Commanding General,
Camp Roberts, California.

Subscribed and sworn to before me at Camp Roberts, California, this 12th day of April, 1951.

/s/ F. M. SASSE, Lt. Col., JAGC,
Staff Judge Advocate, 7th Armored Division, Camp Roberts, California. With the general powers of a Notary Public under Article of War 114 (P. L. 800, 77th Cong., 14 Dec. 42; 56 Stat. 1050; 10 USC 1586) [12]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Southern District of California—ss.

I, E. M. Keeley, Major, AGC, of the United States, being first duly sworn, deposes and says:

I.

That I am District Coordinator for the Selective Service System in the State of California, District No. 5, at Los Angeles, California, and the personal

representative of the State Director of Selective Service.

II.

That Local Draft Board No. 126, Long Beach, California, is within said district, the coordination of which is under my supervision.

III.

That one of my duties as District Coordinator is the review of procedures of Local Boards and Appeal Boards.

IV.

That your affiant has fully reviewed the selective service file of registrant Alphonse P. Olinger, 4-126-26-302, and that I am fully familiar [13] with the selective service file of said registrant.

V.

That Alphonse Paul Olinger was classified 1-A by Local Board No. 126, Long Beach, California, on October 8, 1948. That on October 11, 1948 Selective Service System Form No. 110 was mailed to said registrant advising him that he had been classified 1-A.

VI.

That said Form 110, a copy of which is attached hereto, made a part hereof and marked Exhibit "A", shows on its face the rights of the registrant to appeal such classification.

VII.

That Section 1624.1 issued under Section 10, Pub. Law 759, 80 Cong., provides the registrant an opportunity to appear in person and states as follows:

“(a) Every registrant, after his classification is determined by the Local Board, shall have an opportunity to appear in person before the member or the members of the Local Board designated for the purpose if he files a written request therefor within 10 days after the Local Board has mailed a Notice of Classification (SSS Form 110) to him. Such 10 day period may not be extended except when the Local Board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

“(b) * * * No registrant may be represented before the Local Board by anyone acting as attorney or legal counsel.”

VIII.

Paragraph 1625.2 covering the situation when registrant's classification may be reopened and considered anew, states:

“The Local Board may re-open and consider anew the classification of a registrant (1) upon the written request of the registrant * * * or any person who has on file a written request for the current deferment of [14] the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification.” (Emphasis added.)

IX.

Section 1625.4 of said Act states:

“When a registrant * * * files with the Local Board a written request to reopen and consider anew the

registrant's classification and the Local Board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the Local Board is of the opinion that such facts if true would not justify a change in such registrant's classification, it shall not re-open the registrant's classification." (Emphasis added.)

X.

Appeal to Appeal Board is covered by Part 1626 of the Selective Service System, issued under Section 10, Pub. Law 759, 80 Cong., and states in Section 1626.2:

"(a) The registrant * * * may appeal to an Appeal Board from any classification of a registrant by the Local Board * * *

"(c) The registrant * * * may take an appeal authorized under paragraph (a) of this section at any time within the following periods:

(1) Within 10 days after the date the Local Board mails to the registrant a Notice of Classification (SSS Form No. 110). [15]

(2) Within 30 days after the date the Local Board mails to the registrant a Notice of Classification (SSS Form No. 110) if, on that date it appears that the registrant is located in one and the local board which classified the registrant is located in another of the following: The Continental United States, the

Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands of the United States.

(4) Within 60 days after date the Local Board mails to the registrant a Notice of Classification, if on that date it appears that the registrant is located outside the Continental United States, * * *

“(d) * * * Unless the Local Board thereafter permits an appeal, the right of such persons to appeal shall expire at the end of the period provided for in paragraph (c) of this section.”

XI.

That said registrant made no written or oral request for personal appearance or appeal within the limits as set out in the sections of the Selective Service Act of 1948 as quoted above, nor at any time within a two year period elapsing thereafter, nor did anyone within such time file written or oral request for appearance or appeal on behalf of registrant, but your affiant states with regard thereto that the registrant appeared in person at said Draft Board for the first time on or about August 11, 1950, approximately 7 days after Form 223 ordering registrant to report for a pre-induction physical examination on August 15, 1950, was mailed to him.

XII.

Registrant failed to report for said examination.

XIII.

That no facts or new information, which, if true, would justify a change in the registrant's classifica-

tion, and would thus cause registrant's [16] classification to be reopened and considered anew has ever been submitted to said board. That said board is and was well aware of the fact that registrant had served and was now serving in the Merchant Marine as an assistant engineer duly licensed, but states that deferment for said occupation is not provided for by the Selective Service Act of 1948.

XIV.

That Local Board Memorandum No. 5 issued by General Lewis B. Hershey, Director, National Headquarters Selective Service System, issued October 18, 1948, a true copy of which is attached hereto and made a part hereof, and marked Exhibit "B", defines the status under the Selective Service Act of 1948 of former Merchant Seamen.

XV.

That no request for occupational deferment by any employer of registrant has ever been made.

XVI.

That on September 7, 1950 Form No. 252 ordering registrant to report for induction on September 18, 1950 was mailed to registrant. That registrant failed to report.

XVII.

That on September 22, 1950, after registrant's file was found to be in all respects procedurally proper upon review by one Mr. Hall, a member of said board, the registrant was reported delinquent to the Office of the United States Attorney.

XVIII.

After registrant was contacted by an Agent of the Federal Bureau of Investigation, arrangements were made to process said registrant as a delinquent through the Army Induction Center at 155 West Washington Boulevard, Los Angeles, California.

XIX.

That said registrant was on February 6, 1951 inducted into the Army of the United States. [17]

XX.

That your affiant has carefully reviewed all procedures taken with respect to said registrant and has found them to be entirely in accordance with the laws and regulations of the Selective Service System appertaining thereto, and further states that the classification and induction of said registrant, together with all intermediate steps taken therein, are entirely legal and proper.

Further affiant sayeth not.

/s/ E. M. KEELEY,
Major, AGC, District Coordinator, Los Angeles,
California.

Subscribed and Sworn to before me this 13th day
of April, 1951.

[Seal] /s/ JACK E. HILDRETH,
Notary Public in and for the County of Los Angeles,
State of California. [18]

EXHIBIT "A"

Selective Service System

NOTICE OF CLASSIFICATION

Approval of Budget Bureau not required

.....
(Last name) (First name) (Middle name)

Selective Service No. [] [] [] []
has been classified in Class.... (Until.....,
19....) by [] Local Board. [] Appeal Board,
by vote of to [] President
(Show vote on appeal board cases only)

....., 19....
(Date of mailing) (Member of local board)

The law requires you, subject to heavy penalty for violation, to carry this notice, in addition to your Registration Certificate, on your person at all times—to exhibit it upon request to authorized officials—to surrender it, upon entering the armed forces, to your commanding officer.

For advice, see your Government appeal agent.

The law requires you: (1) To keep in touch with your local board; (2) to notify it of any change of address; (3) to notify it of any fact which might change your classification; (4) to comply with the instructions on the notice of classification part of this form.

NOTICE OF RIGHT TO APPEAL

Appeal from classification by local board must be made within 10 days after the mailing of this notice by filing a written notice of appeal with the local board.

Within the same 10-day period you may file a written request for personal appearance before the local board. If this is done, the time in which you may appeal is extended to 10 days from the date of mailing of a new Notice of Classification after such personal appearance.

If an appeal has been taken and you are classified by the appeal board in either Class 1-A or Class 1-A-O and one or more members of the appeal board dissented from such classification you may file a written notice of appeal to the President with your local board within 10 days after the mailing of this notice.

[19]

EXHIBIT "B"

National Headquarters, Selective Service System
Washington 25, D. C.

Local Board Memorandum No. 5

Issued: October 18, 1948

Subject: Status of Former Merchant Seamen Under Selective Service Act of 1948.

1. Service in the Merchant Marine during World War II.—(a) It has come to the attention of this Headquarters that there exists on the part of many local boards and others connected with the Selective

Service System a lack of full information on the status under the Selective Service Act of 1948 of former merchant seamen who served in the Maritime Service during the war and emergency.

(b) The Selective Service Act of 1948 provides exemption from military service during peacetime for men who performed certain periods of Active Military Duty during the recent emergency and war.

(c) The service performed by members of the Merchant Marine, including cadet-midshipmen, being a civilian service and not a military service, does not qualify them for these exemptions.

2. Certificates Issued to Merchant Seamen.—(a) The Certificate of Completion of a Period of Substantially Continuous Service in the Merchant Marine which merchant seamen received from the War Shipping Administration was not a discharge from the armed forces of the United States.

(b) This Certificate was issued by the War Shipping Administration for the purpose of establishing eligibility for members of the Merchant Marine for reemployment rights provided under Public Law 87, 78th Congress.

(c) The notation "eligible to be relieved from any further consideration for classification into a class available for service", stamped on this Certificate by the War Shipping Administration was evidence of the value which the War Shipping Administration placed upon the services of the individual seamen. Selective Service local boards under the 1940 Act were authorized to consider this information in making their determination as to whether or not At

That Time such individual had made a sufficient contribution to the war effort to warrant his relief from further liability for service under the Selective Training and Service Act of 1940.

3. Deferment or Exemption Because of Former Service in Merchant Marine Not Authorized.—(a) The Selective Training and Service Act of 1940 expired on March 31, 1947, and as the Selective Service Act of 1948 provides no authority for deferments or exemptions because of former service as merchant seamen, this certificate has no bearing on the action of local boards established under this 1948 Act.

(b) Persons who were enrolled in the United States Merchant Marine Academy as cadet-midshipmen were given a reserve status in the Navy, so that during the time that they were pursuing their course of instruction at the academy they would be relieved from liability for service under the Selective Service Act of 1940. Upon graduation, these young men were given the opportunity to elect whether or not they would serve as ensigns on active duty in the United States Navy. Those who did not take advantage of the opportunity to serve in the United States Navy were given licenses for the Merchant Marine.

(c) Men who attended one of the Merchant Marine academies as cadet-midshipmen, while holding during that time a protective U. S. Naval Reserve status, actually performed no active duty service with the armed forces such as would qualify them for a peacetime exemption from service under section 6(b)(1) and (2) of the Selective Service Act of

1948. Nor is it believed, in view of the legislative history of this Act, that administrative action to bring about deferment by reason of former employment as merchant seamen would be consistent with the expressed will of the Congress in this matter.

/s/ LEWIS B. HERSHEY,
Director. [21]

POINTS AND AUTHORITIES

Applicant has waived right to personal appearance and appeal.

“If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege.” Sec. 10 Pub. Law. 759, 80th Cong. (Title 32 CFR § 1641.2 (b)) *United States ex rel La Charity vs. Commanding Officer*. 142 F. 2d 381, 382 (1944).

Boards refusal to reopen case at request of registrant is not a denial of due process. *Smith vs. U. S.*, 157 F. 2d 176, 181 (1946) which states:

“Whether or not the additional evidence was of sufficient weight to require a reopening of the case lay within the discretion of the board.”

and it cannot be said under the circumstances that the discretion was arbitrarily exercised.

Habeas Corpus may not be used as a writ of error and its function is exhausted when it is ascertained that the agency under whose order the petitioner is

being held had jurisdiction to act. *Eagles Post Commanding Officer vs. U. S.*, 329 U. S., 304, 311, 315 (1946).

[Endorsed]: Filed April 14, 1951.

[22]

PETITIONER'S EXHIBIT No. 1

U. S. Department of Labor
Office of the Secretary, Washington

Mrs. Pauline G. Pujol
8705 Wadsworth Avenue
Los Angeles, California

Feb. 13, 1951

Dear Mrs. Pujol:

The receipt is acknowledged of your letter dated January 17, concerning the deferment of your son.

You will be pleased to learn that under date of January 24, the Selective Service System furnished to their local boards copies of the enclosed list of essential activities and critical occupations as information to assist them in making determinations on requests for the deferment of registrants. You will note on page 25 of the enclosure that Assistant Engineers have recently been added to the list of critical occupations.

In view of this occupational information having recently been made available to local boards, you and your son's employer may wish to discuss further with the board the possibility of obtaining a deferment. For your information, there is assigned to each local board an Appeal Agent from whom information can be obtained with regard to procedures

for appealing from decisions of the local board. It may be advisable to discuss the matter with the Appeal Agent assigned to the board which classified your son.

The Selective Service System is the department of government vested with authority to make determinations on requests for the deferment of registrants.

I am sure the local board will be pleased to consider this case in accordance with established rules and regulations for the implementation of the Selective Service System Act of 1948, as amended.

Yours very truly,

/s/ MAURICE J. TOLIN,

Enclosure

Secretary of Labor.

January 15, 1951

Second Addition to Initial List of Critical
Occupations Dated August 3, 1950

Metal Miner, Underground, All Around (Miner 5-21.020, DOT p. 857):

Performs all or a significant combination of the duties involved in driving underground openings to extract ore or rock. Drills holes in working face of ore or rock with a hand or machine drill. Inserts explosives in drill holes and sets it off to break up the mass. Shovels ore or rock into mine cars or onto a conveyor. Pushes mine cars to haulage ways where they are hauled by draft animal, mine locomotive (motor), or haulage cable to the surface, or to the shaft bottom for hoisting. Installs timbering to sup-

port the walls and roof, or for chutes or staging. Lays mine track to extend it to working face. Sinks shaft (in rock) from the surface or from one level to lower levels, in which men, supplies, ore, and rock are lowered into or raised from the mine. This title includes all related titles with the same Dictionary of Occupational Titles code number.

Orthopedic Appliance and Limb Technician (5-09.)

General Definition:

Lays out, makes, and fits artificial limbs and other devices according to customers' specifications and medical prescriptions: Studies specifications or makes plaster casts of stump and normal limbs or body deformity, employing knowledge of limb structure. Selects stock lumber, fibre, metal, or leather, and draws patterns to scale or marks materials. Cuts and carves wooden limbs to specified dimensions, using hand and machine carving tools. Finishes limbs following preliminary fitting by removing wood from exterior or interior parts to reduce weight and obtain proper balance and contour, and fills, sands, and polishes wood. Winds damp fibres around wood forms in fibre-winding machine. Shapes, anneals, and welds sheet-metal tubing and assembles parts of limbs, using bolts, screws, and rivets. Cuts, positions, stretches, molds, and sews plastic or leather to cover limbs or fabricate parts such as leather stump sockets. Makes and repairs arch supports, orthopedic braces, and appliances for feet, legs, and body deformities; cuts and fashions supports from stainless steel, plastics, cork, steel, and leather, using welding equipment, shears, rivet punch, electric drill, chisels,

saws, hammers, and other hand tools. Fits assembled artificial limbs and devices to customer, and adjusts holding-harnesses. This definition includes all titles in the Dictionary of Occupational Titles code group 5-09.400-599, except Surgical-Elastic Knitter, Hand Frame; Artificial-Limb Assembler; Seamstress; Socket Maker; Plastic-Bucket Maker; and Welder-and-Finisher.

Sawsmith:

As a key step in the manufacture of stone-, wood-, metal-, and plastics-cutting band saws, hand saws, and circular saws, smiths (straightens, dekinks, and alines) saw blades made of high grade steel: Receives hardened and tempered blades, and hoists blade on anvil table beneath stretching roller. Manipulates levers to lower electric powered roller on blade and stretch (roll) blade at one or more locations, to impart desirable tension along edges of blade and alter mechanical characteristics of central part of blade. Applies pressure with roller according to size and type of blade, speed and feed at which the saw will operate, and metallurgical characteristics of steel. Hammers out kinks, dents, humps, twists, or bulges in surface of blade using special flat-peen hammers, and gauges surface for trueness by experienced visual observation and by use of straightedge. Inspects entire blade for absolute flatness, straightness, absence of kinks, humps, or other imperfections; rejects blades that show evidence of mechanical or metallurgical defects. This is meant to include only those sawsmiths concerned with the manufacture of industrial saws.

Expanded Definitions

Engineer, Chief, Marine, and Assistant Engineers—

General Definition:

Repairs and operates, or assumes complete charge of, all engines, boilers, electrical equipment, refrigeration equipment, sanitary equipment, deck machinery, and steam connections aboard ship: Keeps log of performance of equipment on voyage. Requisitions supplies and repairs and oversees fueling of ship. Starts, stops, and controls speed of engines, pumps, injectors, condensers, boilers, and supplementary equipment. Supervises workers in engine room. Makes all types of repairs, using machinist's tools and machine-shop equipment. This title includes Engineer, Chief, Marine 0-88.21, and Engineer (water trans.) 0-88.24 and the First Assistant Engineer, Second Assistant Engineer, and Third Assistant Engineer but does not include engineers engaged in such work aboard dredges, tugboats, ferryboats, or fishing vessels.

[Endorsed]: Filed April 16, 1951.

In the United States District Court in and for the
Southern District of California, Central Division

No. 12917—HW—Civil

In the Matter of the Application of

A. PAUL OLINGER,

for a Writ of Habeas Corpus.

ORDER DISMISSING PETITION FOR WRIT
OF HABEAS CORPUS

The above entitled matter came on regularly for hearing on an order to show cause why a writ of habeas corpus should not issue, on April 16, 1951, in the above entitled Court, before the Honorable Harry C. Westover, the applicant being represented by his attorney, Nicolas Ferrara, and the respondent by its attorneys, Ernest A. Tolin, United States Attorney, and Clyde C. Downing and Robert K. Grean, Assistants United States Attorney, appearing by Robert K. Grean, and the Court having requested briefs from counsel on the question of whether or not the Court had jurisdiction, and the matter having been submitted for decision on the matter of jurisdiction, and having been duly considered by the said Court, and the Court having read the briefs of counsel and being fully satisfied in the premises:

It Is Hereby Ordered, Adjudged and Decreed that the Petition for Writ of Habeas Corpus, filed herein on March 5, 1951, shall be, and hereby is, dismissed, and that the Order to Show Cause issued

herein be, and hereby is, discharged, for lack of jurisdiction of this Court to hear said matter on its merits.

Costs taxed at \$20.00.

Dated: June 21st, 1951.

/s/ HARRY C. WESTOVER,
United States District Judge.

Judgment entered June 22, 1951.

[Endorsed]: Filed June 21, 1951. [27]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable Harry C. Westover, Judge of the District Court; Respondent Frank H. Partridge, Brigadier General, United States of America, Commanding General, Camp Roberts, California; Ernest A. Tolin, United States Attorney, Clyde C. Downing and Robert K. Grean, Assistant United States Attorney:

Notice is hereby given that A. Paul Olinger, applicant named above, and Ruth Huffman, petitioner in the above-entitled proceedings, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Judgment, Decree or Order Dismissing the Petition for Writ of Habeas Corpus made and entered on June 22, 1951, in Judgment

Book No. 73, Page 183, and from the whole of said Judgment, Decree or Order.

Dated: July 11, 1951.

/s/ NICOLAS FERRARA,

Attorney for said Applicant and
Petitioner. [29]

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 11, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 33, inclusive, contain the original Petition for Writ of Habeas Corpus; Order to Show Cause Why Writ of Habeas Corpus Should Not Issue; Return to Order to Show Cause Why Writ of Habeas Corpus Should Not Issue; Petitioner's Exhibit 1; Order Dismissing Petition for Writ of Habeas Corpus; Notice of Appeal and Designation of Record which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 15th day of August, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk

[Title of District Court and Cause.]

AFFIDAVIT OF NICOLAS FERRARA FOR
ORDER OF SPECIAL APPOINTMENT
TO SERVE PROCESS

(F.R.C.P. Rule 4(c))

State of California,
County of Los Angeles—ss.

Nicolas Ferrara being duly sworn, deposes and says:

That he is the attorney of record for applicant A. Paul Olinger and petitioner Ruth Huffman in the above-entitled habeas corpus proceedings. On March 6, 1951, the above-entitled court made and issued an order to show cause why writ of habeas corpus should not issue, a copy of which, together with a copy of the petition for writ of habeas corpus filed in the above-entitled proceedings, are required to be served personally upon the Commanding General/Officer of Camp Roberts, a United States Army/Military Camp located in the County of San Luis Obispo, State of California.

Affiant is informed and believes and upon such information and belief alleges that Camp Roberts is two hundred eighteen miles, more or less, from Los Angeles, California, and the United States Marshal in Los Angeles, California, demands travel fees in the sum of approximately \$50.00 to serve personally the aforementioned order and petition. To effect sub-

stantial savings in travel fees to serve the process above-mentioned, request is made for special appointment of the Sheriff of the County of San Luis Obispo, California, or one of his Constabularies, to serve the process above-mentioned, and affiant is informed and believes and upon such information and belief alleges that said special appointment will result in substantial savings in travel fees to effect personal service of the process above-mentioned. This request is made pursuant to Rule 4(c) of the Federal Rules of Civil Procedure which provides for special appointment.

NICOLAS FERRARA

Subscribed and sworn to before me this March 27, 1951.

[Seal] /s/ BURKE MATHES,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed March 29, 1951.

[Title of District Court and Cause.]

ORDER OF SPECIAL APPOINTMENT TO
SERVE PROCESS
(F.R.C.P. Rule 4(c))

The affidavit of Nicolas Ferrara for special appointment to serve process having been filed herein;

It Is Ordered, that the Sheriff of the County of San Luis Obispo, State of California, or one of his Constabularies be and he/they are hereby specially appointed to personally serve the Commanding General/Officer of Camp Roberts, a United States Army/Military Camp, in the County of San Luis Obispo, State of California, with a copy of the petition for writ of habeas corpus filed herein and with a copy of the order to show cause why writ of habeas corpus should not issue made and filed herein by the above-entitled court, together with a copy of this order of special appointment.

Dated: March 28th, 1951.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed March 29, 1951.

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 9th day of April in the year of our Lord one thousand nine hundred and fifty-one.

Present:

The Hon. Harry C. Westover, District Judge.

[Title of Cause.]

MINUTE ORDER

For hearing on Order to Show Cause, filed March 29, 1951, why writ should not issue and the relief prayed for should not be granted;

On motion of Robert Grean, Ass't U. S. Att'y, appearing as counsel for respondent, it is ordered that the matter is continued to April 16, 1951, 10 a.m., for said hearing.

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 4th day of June in the year of our Lord one thousand nine hundred and fifty-one.

Present:

The Hon. Harry C. Westover, District Judge.

[Title of Cause.]

MINUTE ORDER

The petition for Writ of Habeas Corpus herein, heretofore heard and submitted for decision on the question of jurisdiction, having been duly considered, it is now ordered that said petition is denied; counsel for respondent will prepare, serve, and present appropriate formal documents under Local Rule 7 accordingly.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages comprise the original Affidavit and Order of Special Appointment to Serve Process and a full, true and correct copy of minute orders entered April 9 and June 4, 1951.

Witness my hand and the seal of said District Court this 8th day of October, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk

[Endorsed]: No. 13056. United States Court of Appeals for the Ninth Circuit. A. Paul Olinger and Ruth Huffman, Appellants, vs. Frank H. Partridge, Brigadier General, United States of America, Commanding General, Camp Roberts, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: August 16, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 13,056

In the Matter of the Application of
A. PAUL OLINGER,
for a Writ of Habeas Corpus

A. PAUL OLINGER,
Petitioner and Appellant,
vs.

FRANK H. PARTRIDGE, etc.,
Respondent and Appellee.

APPELLANT'S STATEMENT OF POINTS

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause:

I.

The District Court erred in finding and/or concluding that it had no jurisdiction to review the Draft Board's findings and order of induction which appellant attacked as being void on the grounds that the Draft Board had no jurisdiction and the Draft Board acted in violation of due process of law, because appellant did not exhaust his administrative remedies under the Selective Service Act in that he failed to take the administrative appeals provided under said Act.

II.

The District Court erred in finding and/or con-

cluding that it had no jurisdiction to review the Draft Board's findings and order of induction which appellant attacked as being void on the grounds that the Draft Board had no jurisdiction and said findings and order were in violation of the provisions of 46 USCA, sec. 225, Chapter 11, because appellant had not taken the administrative appeals provided by the Selective Service Act.

III.

The District Court erred in finding and/or concluding that it had no jurisdiction to review the legality of appellant's detention in the military service of the United States when and where he is being detained contrary to and in violation of the provisions of 46 USCA, sec. 225, Chapter 11, because appellant had not taken the administrative appeals provided by the Selective Service Act.

Dated: August 28, 1951.

/s/ NICOLAS FERRARA,
Attorney for Appellant,
A. Paul Olinger.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 29, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

The entire record herein is hereby designated as the record which is material to the proper consideration of the appeal filed by A. Paul Olinger, applicant and Ruth Huffman, petitioner, in the above-entitled cause, said record and transcript being more particularly designated as follows:

1. Petition for writ of habeas corpus.
2. Order to show cause returnable April 9, 1951.
3. Affidavit for order of special appointment to serve process.
4. Order of special appointment to serve process.
5. Order of continuance to April 16, 1951, for hearing on order to show cause.
6. Return to order to show cause why writ of habeas corpus should not issue, and all exhibits.
7. Order denying petition for writ of habeas corpus.
8. Order dismissing petition for writ of habeas corpus, and discharge of order to show cause heretofore issued herein, for lack of jurisdiction, heretofore filed June 21, 1951.
9. Notice of Appeal.
10. Designation of record.

11. Appellant's statement of points.

Dated: August 28, 1951.

/s/ NICOLAS FERRARA,
Attorney for Petitioner and
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 29, 1951. Paul P. O'Brien,
Clerk.

